Azman bin Abdullah v Ketua Polis Negara

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-01-5-95
SITI NORMA YAAKOB, ABDUL MALEK AHMAD AND MOKHTAR SIDIN JJCA
3 OCTOBER 1996

Administrative Law *— Rules of natural justice — Disciplinary proceedings — Reduction in rank of public servant — Application to postpone disciplinary proceedings disallowed — Counsel representing public servant could not attend hearing — Whether public servant had full opportunity to state his case*

Administrative Law *— Remedies — Certiorari — Reduction in rank of police inspector — Statement by police department that appellant was free from disciplinary action — Police department aware of wrongdoings of appellant which would have necessitated disciplinary action being taken — Whether issuing of statement amounted to an act of condonation*

Public Servants *— Disciplinary proceedings — Proceedings conducted under Police (Conduct and Discipline) (Junior Officers and Constables) Regulations 1970 — Regulations was made under the Police Act 1967 vide s 2(1) of the Emergency (Essential Powers) Ordinance (No 2) 1969 — Ordinance was subsequently repealed — Whether Regulations was still in force — Whether disciplinary proceedings was valid — Police Act 1967 s 96 — Emergency (Essential Powers) Ordinance (No 2) 1969 s 2(1)*

Constitutional Law *— Emergency — Delegation of legislative powers — Delegation of legislative powers of Yang di-Pertuan Agong to Director of Operations vide Emergency (Essential Powers) Ordinance (No 2) 1969 s 2 (1) — Delegation of Powers Act 1954 prohibits delegation of legislative powers — Whether Delegation of Powers Act 1954 applies to legislation made under the powers conferred by the Federal Constitution — Whether such delegation in direct conflict with the Delegation of Powers Act 1954 — Delegation of Powers Act 1954 ss 2(1) & 11*

The appellant, after serving the Royal Malaysia Police from 1 October 1964 and having been promoted to the rank of sub-inspector on 1 January 1987, was demoted to the rank of sergeant major after disciplinary proceedings which was conducted on 11 and 13 November 1991, on eight disciplinary charges made under the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 ('the Regulations'). The appellant filed a notice of motion to issue an order of certiorari under O 53 of the Rules of the High Court 1980 where the trial judge gave decision for the respondent. The appellant's counsel argued that there was a breach of the rules of natural justice as the appellant was not given a right to be heard. This was because the appellant had applied for a week's postponement of the disciplinary proceedings as the police officer who was representing him was on leave. However, his application was not granted and the hearing proceeded on schedule. The senior federal counsel stressed that any adjournment of a disciplinary hearing was at the discretion of the presiding officer and the appellant had been given a right of

hearing. Further, in judicial review cases there is no right to an oral hearing and counsel need not be present at the hearings at all times. A

Also, it was argued for the appellant that the appellant had applied for optional retirement to take effect on 1 December 1991 by letter dated 1 December 1990 and the Public Services Department by letter dated 4 October 1991 had informed the police department that they had approved the application on 29 August 1991. Therefore, the issue of condonation arose as the respondent's letter stating the eight disciplinary charges was dated 10 October 1991 which contained charges dated from 30 October 1986 to 7 March 1990. However, on 26 March 1991 the police department had furnished all documents and stated in no uncertain terms that the appellant was free from any disciplinary action. Consequently, in condoning the offences in this manner the appellant contended that the decision of the police disciplinary authority was invalid and of no effect. B C

Finally, the appellant's counsel put forth a new argument not raised before the trial judge that the Regulations were made under s 96 of the Police Act 1967 ('the Act') read with s 2 of the Emergency (Essential Powers) Ordinance (No 2) 1969 ('Ordinance 2/69'). However, he submitted that the Regulations were no longer in force when the charges were made against the appellant by the respondent's letter dated 10 October 1991. This was because the Yang di-Pertuan Agong promulgated on 19 February 1971 the Emergency (Essential Powers) Ordinance (No 77) 1971 ('Ordinance 77/71') where in s 3 it was clearly stated that Ordinance 2/69 was repealed with no saving provision. D E

As an alternative submission, he argued that there had been a wrongful delegation of legislative powers under s 96 of the Act by the Yang di-Pertuan Agong vide s 2(1) of Ordinance 2/69 to the Director of Operations to make regulations by virtue of ss 3 and 11 of the Delegation of Powers Act 1956 ('the DOPA'). The senior federal counsel submitted that the Regulations were made under the Act and the Director of Operations had made them under Ordinance 2/69 by virtue of an instrument delegating the power to him. As for delegation of power by the Yang di-Pertuan Agong, s 2(1) of the DOPA clarified that the expression 'written law' does not include the Federal Constitution. In consequence, his contention was that the DOPA did not apply to a delegation of power by the Yang di-Pertuan Agong under the Federal Constitution. F G H

Held, allowing the appeal:

(1) The argument that there was a breach of the rules of natural justice was on flimsy ground as it was not disputed that the appellant did attend the disciplinary proceedings on 11 and 13 November 1991. What was of vital importance was that the appellant should have a full opportunity of stating his case before punishment was meted out. Whether he presented a case of substance was not known in the absence of the notes of the I

disciplinary proceedings. In fact, there was evidence that the appellant had in fact pleaded guilty to the first and second charges. The actual hearing took two days and it would be quite absurd to imagine that during that period of time the appellant was not given a chance to cross-examine his opponent's witnesses or to state his case either orally or in writing (see pp 271D–F and 273B); *Najar Singh v Government of Malaysia & Anor* [1976] 1 MLJ 203 followed.

(2) The issue of condonation in this case stemmed from the fact that the appellant had on 1 December 1990 applied to retire optionally on 1 December 1991 and the police department had written to the Public Services Department on the matter on 26 March 1991 furnishing all the documents and stating in no uncertain terms that it was confirmed that the appellant was free from any disciplinary action. The statement that the appellant was free of any disciplinary action was written on 26 March 1991, and investigations on the alleged charges had in fact commenced by then. Although at that point of time there were no disciplinary proceedings taken against the appellant as yet, the police department was already aware of the wrongdoings of the appellant which would necessitate disciplinary action being taken. The delay in taking action must surely, in these circumstances and based on the authorities, be an act of condonation. Therefore, in view of the doctrine of condonation, the charge against the appellant could not stand (see pp 273E, 275C–D and 287A–B); *Johore Mining Stevedoring Co Ltd v All Malayan Mining Industry Staff Union* [1967] 2 MLJ iii; *District Council, Amraoti v Vithal Vinayak* AIR 1941 Nagpur 125; *LW Middleton v Playfair* AIR 1925 Cal 87 and *Phillips v Foxall* (1872) LR 7 QB 666 followed.

(3) The Regulations were still in force and the orders made thereunder by the police disciplinary authority had been validly made although the maker empowered by delegation, namely the Director of Operations, now no longer existed. The opening paragraph of the Regulations indicated that it was actually made under the Act which was still in force as it had never been repealed (see pp 286I and 287A).

(4) The words 'all powers and authorities' in s 2(1) of Ordinance 2/69, which delegate all powers and authorities conferred on the Yang di-Pertuan Agong to the Director of Operations, must include the delegation of legislative powers as well, especially because that subsection starts off with the words 'the executive authority'. Although the DOPA prohibits the delegation of legislative powers, this delegation of powers was not in direct conflict with s 11 of the DOPA because the DOPA does not apply to the Federal Constitution under which Ordinance 2/69 was made. Therefore, the delegation of legislative powers to the Director of Operations had been properly made (see p286E, G); *Najar Singh v Government of Malaysia & Anor* [1976] 1 MLJ 203

and *Government of Malaysia v Mahan Singh* [1975] 2 MLJ 155 followed. A

[Bahasa Malaysia summary

Perayu, setelah berkhidmat dengan Polis Diraja Malaysia dari 1 Oktober 1964 dan dinaikkan pangkat kepada pangkat sub-inspektor pada 1 Januari 1987, telah diturunkan pangkat kepada sarjan mejar selepas prosiding tatatertib yang dijalankan pada 11 dan 13 November 1991, atas lapan pertuduhan tatatertib yang dibuat di bawah Peraturan Polis (Kelakuan dan Tatatertib) (Pegawai Polis Rendah dan Konstabel) 1970 ('Peraturan tersebut'). Perayu memfailkan suatu notis usul untuk mengeluarkan perintah certiorari di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 di mana hakim perbicaraan memberi keputusan untuk penentang. Peguam untuk perayu berhujah bahawa terdapat suatu perlanggaran rukun keadilan asasi oleh kerana perayu tidak diberi hak untuk didengar. Ini adalah kerana perayu telah memohon penundaan prosiding tatatertib selama seminggu sebab pegawai polis yang mewakilinya bercuti. Namun demikian, permohonannya tidak dibenarkan dan pembicaraan diteruskan mengikut jadual. Peguam kanan persekutuan menegaskan bahawa sebarang penangguhan pembicaraan tatatertib terletak pada budi bicara pegawai yang bersidang dan perayu telah pun diberikan hak untuk didengar. Di samping itu, dalam kes kajian semula kehakiman tiada hak kepada pembicaraan lisan dan peguam tidak perlu hadir di pembicaraan pada semua masa. B C D E

Ia juga dihujahkan untuk perayu bahawa perayu telah memohon persaraan opsyen yang mula berkuatkuasa pada 1 Disember 1991 melalui surat bertarikh 1 Disember 1990 dan Jabatan Perkhidmatan Awam telah pun memberitahu jabatan polis menerusi surat bertarikh 4 Oktober 1991 bahawa mereka telah meluluskan permohonan itu pada 29 Ogos 1991. Oleh itu, isu pemaafan timbul memandangkan surat penentang yang menyatakan lapan pertuduhan tatatertib adalah bertarikh 10 Oktober 1991 yang mengandungi pertuduhan bertarikh 30 Oktober 1986 hingga 7 Mac 1990. Walau bagaimanapun, pada 26 Mac 1991 jabatan polis telah menyediakan semua dokumen dan menyatakan tanpa ragu-ragu bahawa perayu adalah bebas daripada sebarang tindakan tatatertib. Akibatnya, dalam memaafkan kesalahan dalam cara ini, perayu berhujah bahawa keputusan pihak berkuasa tatatertib polis adalah tak sah dan tidak mempunyai kesan. F G H

Akhirnya, peguam perayu mengemukakan hujah baru yang tidak dibangkitkan di hadapan hakim perbicaraan bahawa Peraturan tersebut telah dibuat di bawah s 96 Akta Polis 1967 ('Akta tersebut') dibaca dengan s 2 Ordinan Darurat (Kuasa-Kuasa Perlu) (No 2) 1969 ('Ordinan 2/69'). Walau bagaimanapun, beliau berhujah bahawa Peraturan tersebut tidak lagi berkuatkuasa apabila pertuduhan dibuat terhadap perayu oleh surat penentang bertarikh 10 Oktober 1991. Ini adalah kerana pada 19 Februari 1971 Yang di-Pertuan Agong telah mengisytiharkan Ordinan Darurat (Kuasa-Kuasa Perlu) I

A (No 77) 1971 ('Ordinan 77/71') di mana dalam s 3 ia dinyatakan dengan jelas bahawa Ordinan 2/69 dimansuhkan tanpa peruntukan simpanan.

Sebagai penghujahan alternatif, beliau berhujah bahawa terdapatnya penugasan kuasa perundangan yang salah di bawah s 96 B Akta tersebut oleh Yang di-Pertuan Agong melalui s 2(1) Ordinan 2/69 kepada Pengarah Operasi untuk membuat peraturan menerusi ss 3 dan 11 Akta Perwakilan Kuasa 1956 ('APK'). Peguam kanan persekutuan berhujah bahawa Peraturan tersebut dibuat di bawah Akta tersebut dan Pengarah Operasi telah membuatnya di bawah Ordinan 2/69 melalui suatu instrumen yang menugaskan kuasa itu C kepadanya. Berhubung dengan penugasan kuasa oleh Yang di-Pertuan Agong, s 2(1) APK menjelaskan bahawa ungkapan 'undang-undang bertulis' tidak termasuk Perlembagaan Persekutuan. Akibatnya, hujah beliau adalah bahawa APK tidak terpakai kepada suatu penugasan kuasa oleh Yang di-Pertuan Agong di bawah Perlembagaan D Persekutuan.

Diputuskan, membenarkan rayuan:

(1) Hujah bahawa terdapat perlanggaran rukun keadilan asasi tidak kukuh oleh kerana ia tidak dipertikaikan bahawa perayu telah menghadiri prosiding tatatertib pada 11 dan 13 November 1991. E Apa yang penting sekali adalah bahawa perayu harus mempunyai peluang penuh untuk menyatakan kesnya sebelum hukuman diberikan. Sama ada dia mengemukakan kes yang kukuh tidak diketahui dalam ketiadaan nota prosiding tatatertib. Sebenarnya, terdapat keterangan bahawa perayu telah mengaku salah kepada F pertuduhan pertama dan kedua. Pembicaraan sebenar mengambil masa dua hari dan ianya tidak masuk akal untuk membayangkan bahawa semasa jangkamasa itu perayu tidak diberikan peluang untuk memeriksa balas saksi-saksi penentang atau untuk menyatakan kesnya sama ada secara lisan ataupun bertulis (lihat ms 271D–F dan 273B); *Najar Singh v Government of Malaysia & G Anor* [1976] 1 MLJ 203 diikut.

(2) Isu pemaafan dalam kes ini timbul daripada fakta bahawa pada 1 Disember 1990 perayu telah memohon untuk bersara secara opsyen pada 1 Disember 1991 dan jabatan polis telah menulis kepada Jabatan Perkhidmatan Awam mengenai perkara ini pada H 26 Mac 1991 dengan menyediakan semua dokumen dan menyatakan tanpa ragu-ragu bahawa adalah disahkan perayu bebas daripada sebarang tindakan tatatertib. Pernyataan bahawa perayu bebas daripada sebarang tindakan tatatertib dituliskan pada 26 Mac 1991, dan siasatan atas pertuduhan yang dikatakan telah pun bermula pada masa itu. Walaupun pada tahap masa itu I tiada prosiding tatatertib telah diambil terhadap perayu, jabatan polis sedar akan kesalahan perayu yang menghendaki tindakan tatatertib diambil. Dalam keadaan ini dan berdasarkan autoriti, kelewatan dalam mengambil tindakan seharusnya merupakan

suatu tindakan pemaafan. Oleh yang demikian, memandangkan doktrin pemaafan, pertuduhan terhadap perayu tidak boleh dibiarkan (lihat ms 273E, 275C–D dan 287A–B); *Johore Mining Stevedoring Co Ltd v All Malayan Mining Industry Staff Union* [1967] 2 MLJ iii; *District Council, Amraoti v Vithal Vinayak* AIR 1941 Nagpur 125; *LW Middleton v Playfair* AIR 1925 Cal 87 dan *Phillips v Foxall* (1872) LR 7 QB 666 diikut.

(3) Peraturan tersebut masih berkuatkuasa dan perintah yang dibuat di bawahnya oleh pihak berkuasa tatatertib polis telah dibuat secara sah walaupun pembuat yang diberikan kuasa oleh penugasan, yakni Pengarah Operasi, kini tidak lagi wujud. Perenggan pembukaan Peraturan tersebut menunjukkan bahawa ia sebenarnya dibuat di bawah Akta tersebut yang masih berkuatkuasa oleh kerana ia tidak pernah dimansuhkan (lihat ms 286I dan 287A).

(4) Perkataan-perkataan 'semua kuasa dan pihak berkuasa' dalam s 2(1) Ordinan 2/69, yang menugaskan semua kuasa dan autoriti yang dikurniakan ke atas Yang di-Pertuan Agong kepada Pengarah Operasi, mestilah termasuk penugasan kuasa perundangan juga, terutamanya sebab subseksyen itu bermula dengan perkataan-perkataan 'pihak berkuasa eksekutif'. Walaupun APK melarang penugasan kuasa perundangan, penugasan kuasa ini tidak bertentangan secara terus dengan s 11 APK sebab APK tidak terpakai kepada Perlembagaan Persekutuan di bawah mana Ordinan 2/69 telah dibuat. Oleh yang demikian, penugasan kuasa perundangan kepada Pengarah Operasi telah dibuat dengan betul (lihat ms 286E, G); *Najar Singh v Government of Malaysia & Anor* [1976] 1 MLJ 203 dan *Government of Malaysia v Mahan Singh* [1975] 2 MLJ 155 diikut.

Notes

For cases on rules of natural justice, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 453–501.

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 96–227.

For cases on disciplinary proceedings, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1522–1524.

For cases on emergency, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 817–823.

Cases referred to

Barker v Edger [1898] AC 748 (refd)

Connecticut Fire Insurance Co v Kavanagh [1892] AC 473 (folld)

Daihatsu (Malaysia) Sdn Bhd v Pendakwa Raya [1987] 1 MLJ 88 (refd)

District Council, Amraoti v Vithal Vinayak AIR 1941 Nagpur 125 (folld)

Government of Malaysia v Mahan Singh [1975] 2 MLJ 155 (folld)

A *Gulwant Singh v Abdul Khalik* [1965] 2 MLJ 55 (folld)
Harish Chandra v State of Madhya Pradesh AIR 1965 SC 932 (refd)
Johnson Tan Han Seng v PP and other cases [1977] 2 MLJ 66 (refd)
Johore Mining & Stevedoring Co Ltd v All Malayan Mining Industry Staff Union [1967] 2 MLJ iii (folld)
B *Letchumi & Anor v The Asia Insurance Co Ltd* [1972] 2 MLJ 105 (folld)
Low Chang Hian v Kelab Golf Di-Raja Selangor [1995] 3 MLJ 1 (refd)
LW Middleton v H Playfair AIR 1925 Cal 87 (folld)
Mohd Azam Shuja & Ors v United Malayan Banking Corp Bhd [1995] 2 MLJ 851 (folld)
C *Murphy v Duke* [1985] 2 All ER 274 (refd)
Najar Singh v Government of Malaysia & Anor [1976] 1 MLJ 203 (folld)
Phillips v Foxall (1872) LR7 QB 666 (refd)
PP v Chew Siew Luan [1982] 2 MLJ 119 (refd)
D *PP v Khong Teng Khen & Anor* [1976] 2 MLJ 166 (refd)
R v Camberwell City Council ex p Heller & Gocs [1965] VR 491 (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261 (folld)
Watson v Winch [1916] 1 KB 688 (refd)

E **Legislation referred to**

Constitution (Amendment) Act 1981 (Act A514)
Delegation of Powers Act 1956 ss 3, 11
Emergency (Essential Powers) Ordinance (No 2) 1969 ss 2(1), 8
Emergency (Essential Powers) Ordinance (No 77) 1971 s 3
F Emergency (Essential Powers) Act 1979 s 13
Federal Constitution arts 39, 150(2), 150(2B), 150(2C), 150(8)(b)(iii)
Interpretation Acts 1948 and 1967 ss 2, 3, 23, 28
Police Act 1967 ss 96, 96(1), 96(2)(b)
Police (Conduct and Discipline) (General Order Chapter D) Regulations 1969
G Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970
Rules of the Court of Appeal 1994 r 18(2)

Appeal from: Originating Motion No R1–25–152–1991 (High Court,
H Kuala Lumpur)

Oh Choong Ghee (*Shafee & Co*) for the appellant.
Abu Bakar Jais (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

I *Cur Adv Vult*

Abdul Malek Ahmad JCA (delivering the judgment of the court): Having served in the Royal Malaysia Police from 1 October 1964 and having been

promoted to the rank of sub-inspector on 1 January 1987, one can expect the appellant to be upset when he received a letter dated 10 October 1991 on 21 October 1991 from the police disciplinary authority listing out eight disciplinary charges against him under the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 ('the Regulations'). A

The appellant had replied on 6 November 1991 claiming trial to all eight charges and the disciplinary proceedings had been conducted on 11 and 13 November 1991 whereupon the appellant was found guilty on the first, second, third, seventh and eighth charges but acquitted on the fourth, fifth and sixth charges. The punishment imposed was a reduction in rank from sub-inspector to sergeant-major, the post he had held before his promotion in 1987. B C

It is quite unnecessary to reproduce the eight charges here and it would suffice to state that the first charge related to the appellant's failure to maintain a detective service journal between 30 October 1986 to 2 September 1989; the second concerned the failure to produce his pocket book to his superior as directed on various dates between 10 January 1988 to 2 February 1989; the third was as a result of his failure to declare his assets as on 2 September 1989, one Isuzu Tropper No BCJ 2766, one Ford Laser 'S' No BCD 9163, one Daihatsu Charade No WBD 6184 and one house at No 15 Jalan Bunga Melor 8, Taman Muda Ampang, Selangor. The other five charges were as regards what allegedly took place on the morning of 7 March 1990. The fourth charge was for his failure to report for duty on that date between 8am and 12.30pm; the fifth was for his non-attendance at a briefing at 9am also on that same date; the sixth was for not informing his superior between 8am and 12.30pm on the said date of his whereabouts; the seventh was for making a false entry in his pocket-book that at 8.05am on that date he was at work when he was actually at Ah Fook coffee shop opposite the police station; and the eighth was for not applying for medical leave at 12.30pm on that date having earlier gone for medical treatment at a private clinic. D E F

His ex parte notice of motion dated 23 December 1991 for leave to issue an order of certiorari under O 53 of the Rules of the High Court 1980 ('the RHC'), originally against the respondent and three others, namely the Minister of Home Affairs, the Inspector General of Police and the Government of Malaysia, had been granted against the respondent alone on 6 July 1993 with costs in the cause. There is nothing in the records to explain why and how the names of the other three respondents were deleted in the process. G H

The relevant notice of motion dated 12 July 1993 had been fixed on 26 January 1994 but was finally heard on 3 January 1995. Incidentally, these dates are given to show the unexplained delay from the time leave was applied for until the matter was eventually disposed of at first instance. I

Before we proceed to discuss the merits of this appeal, it is appropriate to mention two other matters. The first is that the appellant did apply on 6 November 1991 for a week's postponement of the disciplinary hearing

A because the Indian police officer who was going to represent him would be on leave, because of Deepavali or the Festival of Lights. Obviously, the application was not granted as the hearing did go on on the scheduled date, but without the records being produced, we are unable to determine whether the officer representing him did appear or otherwise. The second is that the appellant had applied for optional retirement to take effect on B 1 December 1991 by letter dated 1 December 1990 and the Public Services Department by letter dated 4 October 1991 had informed the police department that they had approved the application on 29 August 1991. This fact is important because the respondent's letter listing out the eight charges was dated 10 October 1991.

C As at the hearing before the learned trial judge, learned counsel for the appellant had raised a number of grounds before us which from an overall perspective could be conveniently dealt with under two headings.

The first is as regards the breach of the rules of natural justice, meaning simply that the appellant was not given an opportunity to be D heard. This argument is definitely on flimsy ground as although we and the learned trial judge had not been furnished with the relevant notes of the disciplinary proceedings, it is not disputed that the appellant did attend the hearings on 11 and 13 November 1991. What is of vital importance is that the appellant should have a full opportunity of stating his case before the punishment is meted out. Whether he presented a case E of substance is not known in the absence of the notes of the disciplinary proceedings. As for the request for a postponement, there is no clear evidence as to whether it was rejected or whether the officer chosen to represent the appellant by the appellant himself did attend the hearings or otherwise. Instead, there is evidence that the appellant had in fact pleaded F guilty to the first and second charges.

At this juncture, it may be pertinent to reproduce the speech of Viscount Dilhorne on this point in the course of delivering the judgment of the Judicial Committee in *Najar Singh v Government of Malaysia & Anor* [1976] 1 MLJ 203 at p 205:

G > The appellant does not complain that he was not informed in writing of the grounds on which his dismissal was to be considered. He does not complain of a breach of reg 27 in that respect. His complaint is that he was not given an opportunity of being heard orally before being dismissed and he contends that reg 27, which in this respect follows art 135(2) of the Constitution, requires that before being dismissed, he should have been given such an H opportunity. He contends that 'being heard' means 'being heard orally'.
>
> The word 'heard' does not invariably connote an oral hearing. It can be used and is not infrequently used in relation to something written. The question, 'Have you heard from X?', often means, 'Have you had a letter from X?'. Its meaning must depend on the context in which it is used and the context in which it is used in these regulations shows that in reg 27 it I cannot have been intended only to mean an oral hearing. Regulation 27 has to be read with reg 30 and that makes no provision for an oral hearing if the officer fails to make representations in writing or the representations he makes in writing do not exculpate him. It is only if a Committee of Inquiry is appointed that he will be given the opportunity of giving oral evidence.

In their Lordships' opinion, reg 27 is not to be interpreted as imposing an obligation to hear an officer orally. A

In a number of cases, the argument has been put forward that the omission to hear a party orally was contrary to natural justice. In *Local Government Board v Arlidge* [1915] AC 120 evidence had been given on behalf of Mr Arlidge at a public inquiry, but he claimed to be entitled to be heard orally by the Local Government Board to which he was appealing before they decided his appeal. The House decided that he was not so entitled, Viscount Haldane LC saying at p 134: B

> 'I do not think the Board was bound to hear the respondent [Arlidge] orally, provided it gave him the opportunities he actually had.'

In *The King v Housing Appeal Tribunal* [1920] 3 KB 334, the appeal tribunal, having received the appellant's notice of appeal and the local authority's statement in reply, dismissed the appeal. It was held that under the rules of procedure applicable, the appeal tribunal might dispense with an oral hearing, but that they were bound to give the appellant a hearing in the sense of an opportunity of putting his case, Sankey J (as he then was), saying at p 346: C D

> 'Now a hearing in my view need not be an oral one, it may be on written representations.'

In *Malloch v Aberdeen Corp* [1971] 1 WLR 1578, Lord Wilberforce at p 1594 said:

> 'The appellant [a teacher] is entitled to complain if, whether in procedure or in substance, essential requirements, appropriate to his situation in the public service under the respondents, have not been observed, and, in case of non-observance, to come to the court for redress. E
>
> The particular principle of administrative law to which he appeals is that, before his dismissal became effective, he ought to have been given an opportunity of making written representations to or of being heard by the education authority... . The appellant has first to show that his position was such that he had, in principle, a right to make representations before a decision against him was taken. But to show this is not necessarily enough, unless he can also show that if admitted to state his case he had a case of substance to make.' F

In this passage which was cited by counsel on behalf of the appellant, the context shows that the words 'being heard' meant 'being heard orally' but this passage is no support for the proposition that unless there is an oral hearing, there is a denial of natural justice. Indeed, it points in the opposite direction. What is important is that the officer concerned should have a full opportunity of stating his case before he is dismissed. The Chapter D Regulations 1969 provided this and the appellant availed himself of the opportunity, though as the content of his representations was not disclosed, their Lordships are unable to say whether he presented a case of substance. G H

Accordingly, the Privy Council in that case had, in dealing with the validity of both the Regulations and the Public Officers (Conduct and Discipline) (General Order Chapter D) Regulations 1969, opined in their penultimate paragraph at p 205 that: I

> In the circumstances, the plea by the appellant that there was a denial of natural justice must in their Lordships' opinion be rejected. As this plea was put forward, their Lordships have dealt with it though as the Regulations,

A which have the force by law, lay down a detailed procedure which was followed in this case, their Lordships do not consider that such a plea was really open to the appellant.

In our case, the actual hearing took two days and it would be quite absurd to imagine that during that period of time the appellant was not given a B chance to cross-examine his opponent's witnesses or to state his case either orally or in writing. In De Smith's *Judicial Review of Administrative Action* at pp 200–201, it is stated:

> What the *audi alteram partem* rule guarantees is an adequate opportunity to appear and be heard (subject to the proviso that in some situations prior notice may be valid although not in fact received). The rule does not C guarantee that a hearing or inspection shall never proceed or that action shall never be taken to a person's detriment unless everyone entitled to appear does in fact appear. There are indeed situations in which it will normally be unjust to proceed with a hearing in the absence of a person liable to sustain serious detriment by the outcome; but it may still be justifiable in such situations to proceed if that person has absented himself D without reasonable cause. Clearly, it will not be justifiable to proceed if the time or place fixed for a hearing is such that an interested party cannot reasonably be expected to attend, or (if he attends) to be able to prepare his case properly.

On these considerations, this ground fails.

E The second concerns the doctrine of condonation. This stems from the fact that the appellant had on 1 December 1990 applied to retire optionally on 1 December 1991 and the police department had written to the Public Services Department on the matter on 26 March 1991 furnishing all the documents and stating in no uncertain terms that it is confirmed F that the appellant is free from any disciplinary action.

On 4 October 1991, the Public Services Department had replied saying that they had already approved the appellant's application on 29 August 1991. Following the disciplinary proceedings on 11 and 13 November 1991, the police department had written to the Public Services Department on 30 November 1991 to inform them that disciplinary G action had been taken against the appellant and that he had been reduced in rank from sub-inspector to sergeant-major.

The grouse of the appellant is that in view of the dates in the charges levelled against him dating from 30 October 1986 to 7 March 1990 which strongly indicated considerable delay in taking action, and telling the H Public Services Department earlier in the same year, namely in 1991 that there was no disciplinary proceedings against him, the respondent had either overlooked, forgiven, approved or sanctioned his wrongdoings and they were acting in bad faith when they took action against him after the appellant had made, and the police department had supported, his application for optional retirement, and after the Public Services Department I had given their approval. Consequently, in condoning the offences in this manner and in imposing a punishment not commensurate with the offences, the appellant contends the decision of the police disciplinary authority was invalid and of no effect.

Learned counsel for the appellant had referred to four authorities. In *Johore Mining & Stevedoring Co Ltd v All Malayan Mining Industry Staff Union* [1967] 2 MLJ iii before the Industrial Arbitration Tribunal, it was held:

> Incident prior to the incidents leading to the termination of the storekeeper's services had been waived by the company and should not be taken into account by the tribunal in its consideration of the issue as to whether or not such termination was justified.

In *District Council, Amraoti v Vithal Vinayak* AIR 1941 Nagpur 125, the court said:

> Once a master has condoned any misconduct which would have justified dismissal or a fine, he cannot after such condonation go back upon his election to condone and claim a right to dismiss him [the servant] or impose a fine or any other punishment in respect of the offence which has been condoned. This rule is to be found in *LW Middleton v H Playfair* AIR 1925 Cal 87 and in many other cases. The reason is obvious. A servant, even though he misconducts himself, has a right to seek other employment, and it is proper and just that he should be given the earliest opportunity of seeking such fresh employment. As time goes by and he grows older, his chances of obtaining employment grow less and less. Therefore the rule is that a servant must be dismissed at once or given the chance of serving upon a fresh contract. If no such terms are imposed then clearly new terms cannot be imposed at some later date after the election to condone has been made, for the simple reason that had these conditions been put forward at the time, the servant might have preferred dismissal and the opportunity of obtaining other service. That is the reason underlying the rule which, in my opinion, is a fair, just and proper one.

The relevant finding in *LW Middleton v H Playfair* AIR 1925 Cal 87 was as follows:

> We have been pressed to hold on behalf of Middleton that he was constrained to act as he did, because the conduct of Playfair had seriously prejudiced the interest of the estate, and that he could have fully justified his action even if he had dispensed with his services under cl 9 of the agreement. In our opinion, it would be fruitless to investigate whether Playfair had or had not misconducted himself so as to justify his dismissal by Middleton. If a master on discovering that his servant has been guilty of misconduct which would justify a dismissal, yet elects to continue him in his service, he cannot at any subsequent time dismiss him on account of that which he has waived or condoned.

On the same point, the Court of Queen's Bench in *Phillips v Foxall* (1872) LR 7 QB 666 at p 680 ruled as follows:

> Now the law gives the master the right to terminate the employment of a servant on his discovering that the servant is guilty of fraud. He is not bound to dismiss him, and if he elects, after knowledge of the fraud, to continue him in his service, he cannot at any subsequent time dismiss him on account of that which he has waived or condoned.

As for the facts in this case, the relevant officer in the police department had explained that he had made a mistake when he told the Public Services

Department that there was no disciplinary action against the appellant when he actually knew there was. When a particular disciplinary action commences is a separate issue altogether, but in this case, it is our view that it must begin when investigations are initiated and this must well be before the police disciplinary authority informs the person concerned the charges he has to face which in this particular instance was only by the letter dated 10 October 1991. The statement that the appellant was free of any disciplinary action was written on 26 March 1991, and from the admission of the mistake, investigations had in fact commenced by then. Although at that point of time there were no disciplinary proceedings taken against the appellant as yet, the police department was already aware of the wrongdoings of the appellant which would necessitate disciplinary action being taken. Why was nothing done since the latest date of the offences was just over a year before they made that so-called erroneous statement to the Public Services Department while supporting the appellant's request for optional retirement? The delay in taking action must surely, in these circumstances and based on the authorities, be an act of condonation. As for the punishment, however, nowhere can we find that the police disciplinary authority had acted beyond its powers, but if the issue of condonation had been taken into consideration, the trial judge's decision would surely have been the other way.

It is settled law that in a judicial review by way of a certiorari application, the court is only concerned with the decision-making process and not with the decision. It is not an appeal from the decision made, but a review of the manner in which it was made, and it is not the court's function to consider whether on the merits of the facts of the case, the said decision was fair and reasonable.

However, before us, learned counsel for the appellant had raised a new point not raised before the learned trial judge and since the learned senior federal counsel had no objections and based on the Federal Court decisions in *Gulwant Singh v Abdul Khalik* [1965] 2 MLJ 55 and in *Letchumi & Anor v The Asia Insurance Co Ltd* [1972] 2 MLJ 105, the English Court of Appeal's finding in *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473, this court's judgment in *Mohd Azam Shuja & Ors v United Malayan Banking Corp Bhd* [1995] 2 MLJ 851 and in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 and in view of r 18(2) of the Rules of the Court of Appeal 1994, we had allowed this point to be argued.

The Regulations, according to learned counsel for the appellant, had been made under s 96 of the Police Act 1967 ('the Act') read with s 2 of the Emergency (Essential Powers) Ordinance (No 2) 1969 ('Ordinance 2/69') dated 24 February 1970 and published on 28 February 1970. However, he added, they were no longer in force when the charges were made against the appellant by the respondent's letter dated 10 October 1991.

This was because, he continued, the Yang di-Pertuan Agong had promulgated on 19 February 1971, the Emergency (Essential Powers) Ordinance (No 77) 1971 ('Ordinance 77/71') where in s 3, it is clearly

stated that 'the Emergency (Essential Powers) Ordinance (No 2) 1969 is hereby repealed with no saving provision'. A

He further went on to submit that there was an attempt to validate all essential regulations by s 13 of the Emergency (Essential Powers) Act 1979 ('the 1979 Act') which came into force on 20 February 1971, and it is appropriate to reproduce the said section here: B

> 13 Repeal and saving
>
> (1) The Emergency (Essential Powers) Ordinance 1969 is hereby repealed.
>
> (2) Notwithstanding subsection (1), all subsidiary legislation made under the said Ordinance and in force immediately before 20 February 1971 shall (without prejudice to the power to amend the same by any subsidiary legislation made under the appropriate provision of this Act and subject to such modifications as may be necessary to bring such subsidiary legislation into conformity with this Act) continue in force until repealed or replaced by subsidiary legislation made under the appropriate provision of this Act, and shall be deemed to have been made thereunder. C D

Subsection (1) of s 96 of the Act confers the powers on the Yang di-Pertuan Agong to make 'Police Regulations' and in particular, as stated in para (b) sub-s (2) on matters relating to discipline. By virtue of sub-s (1) of s 2 of Ordinance 2/69, the executive authority of Malaysia referred to in art 39 of the Federal Constitution ('the Constitution') and all powers and authorities conferred on the Yang di-Pertuan Agong by any written law are delegated to a Director of Operations who shall be a person designated by the Yang di-Pertuan Agong. As stated by learned counsel for the appellant, Ordinance 2/69 had been repealed by Ordinance 77/71 on 19 February 1971 with no saving clause. Does that mean the Regulations are no longer in force? E F

Before we answer that question, it is pertinent to refer to the 1979 Act where in s 13 (as reproduced earlier), despite the repeal of the Ordinance, it saves all subsidiary legislation made under it and, in force immediately before 20 February 1971 until repealed or replaced by subsidiary legislation made under the 1979 Act. However, the said section must surely refer only to the first emergency ordinance or Ordinance No 1, called the Emergency (Essential Powers) Ordinance 1969, as seen from the heading and short title of that ordinance without any reference to its number, in which case it follows that Ordinance 2/69 is not affected and it cannot, therefore, be argued that the subsidiary legislation under Ordinance 2/69 have been saved by the 1979 Act. G H

According to s 28 of the Interpretation Acts 1948 and 1967 ('Act 388'), where a written law repeals in whole or in part any former written law and substitutes other provisions therefor, subsidiary legislation made under the repealed law shall, in so far as it is not inconsistent with the substituted provisions, remain in force until revoked or replaced by subsidiary legislation made under the repealing law, and shall be deemed for all purposes to have been made thereunder. In normal circumstances, this would mean that the Regulations under Ordinance 2/69 would continue I

in force until revoked or replaced by subsidiary legislation made under Ordinance 77/71. However, s 2 of Act 388 states that Part I of that Act, which includes s 28, only applies to the following:

> 2 Application
>
> (1) Subject to this section, Part I of this Act shall apply for the interpretation of an otherwise in relation to —
>
> (a) this Act and all Acts of Parliament enacted after 18 May 1967;
>
> (b) all laws, whether enacted before or after the commencement of this Act, revised under the Revision of Laws Act 1968;
>
> (c) all subsidiary legislation made under this Act and under Acts of Parliament enacted after the commencement of this Act;
>
> (d) all subsidiary legislation, whether made before or after the commencement of this Act, revised under the Revision of Laws Act 1968;
>
> (e) all subsidiary legislation made after 31 December 1968, under the laws revised under the Revision of Laws Act 1968.
>
> (2) PART I shall not apply for the interpretation of or otherwise in relation to any written law not enumerated in subsection (1).
>
> (3) PART I shall not apply where there is —
>
> (a) express provision to the contrary; or
>
> (b) something in the subject or context inconsistent with or repugnant to its application.

Further, s 3 of Act 388 defines 'Act' or 'Act of Parliament' used with reference to legislation as a law made by Parliament. This strongly indicates that emergency legislation is excluded from the provisions of Act 388 and we are therefore back where we started.

To prove his point further, learned counsel for the appellant had referred to Guru Prasanna Singh's *Principles of Statutory Interpretation* (5th Ed, 1992) at p 396 which says:

> As a consequence of the general principle that a statute after its repeal is as completely effaced from the statute book as if it had never been enacted, subordinate legislation made under a statute ceases to have effect after repeal of the statute. This result can be avoided by insertion of saving clauses providing to the contrary.

and he had cited *Watson v Winch* [1916] 1 KB 688, *Harish Chandra v State of Madhya Pradesh* AIR 1965 SC 932 and *Daihatsu (Malaysia) Sdn Bhd v Pendakwa Raya* [1987] 1 MLJ 88 as relevant authorities.

As an alternative submission, he had argued that there had been a wrongful delegation of powers to the Director of Operations to make regulations. The Federal Court had held in *Johnson Tan Han Seng v PP and other cases* [1977] 2 MLJ 66 that what the Attorney General was required to decide in those cases was in truth a function of His Majesty's legislative power and that cannot be done as it 'would involve a delegation by His Majesty of his legislative power which is invalid as going too far and amounting to an abandonment of his function and duty'.

Legislatively, ss 3 and 11 of the Delegation of Powers Act 1956 ('the DOPA') are relevant. Sections 3 and 11 of the DOPA read:

> 3 Power of Yang di-Pertuan Agong to delegate powers and duties
>
> Where by any written law the Yang di-Pertuan Agong is empowered to exercise any powers or perform any duties, he may, subject to section 11, by notification in the Gazette, delegate subject to such conditions and restrictions as may be prescribed in such notification the exercise of such powers or the performance of such duties to any person described by name or office.
>
> 11 No delegation of power to make regulations
>
> Nothing in this Part shall apply to any power to make regulations conferred upon any person by any written law.

Before we get dizzy on the merry-go-round, it is best to examine the submissions of learned senior federal counsel for the respondent. According to him, the Regulations were made under the Act and the Director of Operations had made them under Ordinance 2/69 by virtue of an instrument delegating the power to him. As for the delegation of power by the Yang di-Pertuan Agong, sub-s (1) of s 2 of the DOPA has clarified that in Part II therein, which includes both ss 3 and 11, the expression 'written law' does not include the Federal Constitution. In consequence, his contention was that the DOPA did not apply to a delegation of power by the Yang di-Pertuan Agong under the Federal Constitution.

He stressed that any adjournment of the disciplinary hearing was at the discretion of the presiding officer and as far as the respondent was concerned, it had been exercised reasonably and the appellant had been given a right of hearing. He added that in judicial review cases, there is no right to an oral hearing and counsel need not be present at the hearings at all times. There was also evidence, he said, to suggest that the respondent knew what the appellant had done earlier and as for the delay, he submitted that it was possible that the respondent discovered the misdeeds only in 1990 and 1991.

We must admit that we were quite taken aback by the brevity of the submissions of learned senior federal counsel considering the lengthy arguments of learned counsel for the appellant and directed him to submit more fully in writing.

This he did, beyond the two week period we gave him, where he had elaborated on his oral submissions and had referred to cl (2) of art 150 of the Constitution which states:

> A Proclamation of Emergency under clause (1) may be issued before the actual occurrence of the event which threatens the security, or the economic life, or public order in the Federation or any part thereof if the Yang di-Pertuan Agong is satisfied that there is imminent danger of the occurrence of such event.

and had concluded that the said provision enables the Yang di-Pertuan Agong under a proclamation of emergency to make ordinances having the force of law when Parliament is not sitting; that all emergency ordinances

have the force of law; and that the Yang di-Pertuan Agong could validly delegate his powers to the Director of Operations to make the Regulations.

He went on to submit that the DOPA is a general law and the general provisions therein cannot in any way override the special provisions of sub-s (1) of s 2 of Ordinance 2/69 and cl (2) of art 150 of the Constitution on the principle of generalibus specialia derogant. He had cited *PP v Chew Siew Luan* [1982] 2 MLJ 119 where the court had stated that generalibus specialia derogant is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law and it would be erroneous to apply expressions used and provisions made in one statute to another and entirely different one in complete disregard of the latter's express stipulations in the light of its specific purpose and object. On the other hand, it is a sound, and indeed, a well-known principle of construction of a statute that the purport of words and expressions used in a legislative measure must take their colour from the context in which they appear.

He had also referred to *PP v Khong Teng Khen & Anor* [1976] 2 MLJ 166 where the question posed to the Federal Court was as regards the validity of the Essential (Security Cases) Regulations 1975 ('the ESCAR') and the subsequent amendments in the light of art 150 of the Constitution. In a two to one judgment, the Federal Court ruled that:

(a) the ESCAR were made not under cl (2) of art 150 of the Constitution, but under s 2 of the Emergency (Essential Powers) Ordinance 1969, and therefore, the fact whether or not they were made when Parliament was sitting was irrelevant;

(b) by virtue of sub-s (4) of s 2 of the Emergency (Essential Powers) Ordinance 1969, the ESCAR were valid notwithstanding that they are inconsistent with the Federal Constitution, but in fact it had not been shown that they were inconsistent with the Constitution;

(c) it is lawful for the Yang di-Pertuan Agong to delegate under s 2 of the Ordinance power to himself to make regulations inconsistent with the Constitution;

(d) the ESCAR do not have to comply with art 149 of the Constitution as they were made not under the authority of that Article, but under the authority of art 150;

(e) the Emergency (Essential Powers) Ordinance 1969, were properly and validly promulgated under cl (2) of art 150 of the Constitution; and

(f) the ESCAR were not ultra vires s 2 of the Emergency (Essential Powers) Ordinance 1969, as the power to make regulations under sub-s (2) of s 2 is expressed to be without prejudice to the generality of the powers conferred by sub-s (1) of s 2 which gives the Yang di-Pertuan Agong wide powers to 'make any regulations whatsoever which he considers desirable or expedient for securing the public safety, the defence of Malaysia, the maintenance of public order and

of supplies and services essential to the life of the community' and also because para (j) of s 2(2) of the Ordinance expressly gives power to the Yang di-Pertuan Agong to make essential regulations amending the law, suspending the operation of any written law and applying any written law with modification. A

In his dissenting speech, Ong Hock Sim FCJ said: B

> The question of delegation was likewise dealt with in *Eng Keock Cheng v PP* [1966] 1 MLJ 18 where Wylie CJ (Borneo) said:
>
> > 'The true effect of art 150 is that, subject to certain exceptions set out therein, Parliament has, during an emergency, power to legislate on any subject and to any effect, even if inconsistencies with articles of the Constitution (including the provisions for fundamental liberties) are involved. This necessarily includes authority to delegate part of that power to legislate to some other authority, notwithstanding the existence of a written Constitution.' C

Pending our decision, learned counsel for the appellant had thereafter requested for permission to file in further written submissions in reply to the learned senior federal counsel and we had allowed it in view of the complexity of the matter. D

In his subsequent submissions, he had stated that the only issue is whether the Yang di-Pertuan Agong can delegate to the Director of Operations designated under Ordinance 2/69 the Yang di-Pertuan Agong's legislative powers under s 96 of the Act. E

Subsection (1) of s 2 of Ordinance 2/69 states:

> 2 (1) The executive authority of Malaysia referred to in article 39 of the Constitution and all powers and authorities conferred on the Yang di-Pertuan Agong by any written law are hereby delegated to a Director of Operations who shall be a person designated by the Yang di-Pertuan Agong. F

He argued that at first blush, this provision appears to be in direct conflict with s 11 of the DOPA. In such a case, he added, the various rules of statutory interpretation and canons of construction may have to be resorted to, to determine which law will prevail. His submission was that the first duty of the court in the face of an apparent repugnancy or conflict is to endeavour to reconcile the two conflicting legislation so far as it is consistent with the language used. G

In Donald Gifford *Statutory Interpretation* (1990), the learned author citing *Proprietors of Strata Plan No 159 v Parramatta City Council* (1985) 55 LGRA 363, said at p 105: H

> The courts are far from eager to discover inconsistencies in the statutes. They have no wish to impute to Parliament incompatible legislation: 'So far as is consistent with the language used, courts should endeavour to reconcile legislation, so that the provisions of several Acts can operate harmoniously with each other. I

And at pp 107–108, the said author continues:

> ... sometimes the court's best efforts at reconciliation end in failure, and it is necessary for one statute (at least to some extent) to override the other. In the ordinary course, it will be the later Act which will prevail. The current Parliament 'cannot invalidate future acts of Parliament' and it cannot bind its successors. This necessarily follows from the fact that parliaments are elected from time to time: it would be absurd to suppose that legislation brought forward by a government that has long since lost office could never be repealed or amended by any subsequent legislature. The current Parliament, of course, possesses the power to correct the mistakes made by its predecessors.

In *Low Chang Hian v Kelab Golf Di-Raja Selangor* [1995] 3 MLJ 1, KC Vohrah J states at p 5:

> Richard Talalla J has succinctly summarized the principles and the case law to be used in construing rules which appear to conflict in *PB Securities Sdn Bhd v Abdul Rashid bin Mohamed* [1994] 3 MLJ 168 at p 171B–D:
>
> > 'As to the principles to be applied in construing the Rules, in *Proprietors of Strata Plan No 159 v Parramatta City Council* (1985) 55 LGRA 363 at p 364, per Kirby P (NSW) CA, it was stated that so far as is consistent with the language used, courts should endeavour to reconcile legislation, so that the provisions of several Acts can operate harmoniously with each other. In *Barker v Edger and Others* [1898] AC 748 at p 754, per Lord Hobhouse (PC), it was said that when the legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject matter and its own terms. The same canon of construction has also been applied to the English Rules of the Supreme Court, see *Hasker v Wood* (1885) 54 LJQB 419 and *Bostock v Ramsey Urban District Council* [1900] 1 QB 357; [1900] 2 QB 616 and the county courts, see *Reeve v Gibson* [1891] 1 QB 652.'

That case, of course, dealt with the apparent conflict between O 14 and O 32 r 13(2) of the RHC.

Learned counsel for the appellant was of the opinion that if the words 'powers and authorities' in sub-s (1) of s 2 of Ordinance 2/69 are read as or construed to include legislative powers and authorities, then it is clearly in conflict with s 11 of the DOPA. Having regard, however, to the two authorities cited earlier, he submitted that the court should attempt to reconcile the two provisions before finding that there is actually a conflict.

His view was that they are not, in that the words 'powers and authorities' do not include legislative powers and authorities despite the use of the word 'all' before them because of what s 8 of Ordinance 2/69 states and because of the word 'executive' at the beginning of s 2. He said the words 'all powers and authorities' appearing after the words 'executive authority of Malaysia' must take its colour from the word 'executive'.

As for s 8 of Ordinance 2/69, it states:

> For the purpose of this Ordinance the Director of Operations may make essential regulations under section 2 of Emergency (Essential Powers)

> Ordinance (No 1) 1969 for any or all of the purposes as set out in that section. A

Learned counsel continued by saying that clearly, therefore, s 8 of Ordinance 2/69 already conferred on the Director of Operations legislative powers and would, be totally redundant if s 2(1) of Ordinance 2/69 were to be construed as including the delegation of legislative powers. The principle B that a lawmaker does not waste unnecessary words or make unnecessary laws would militate against such a construction of sub-s (1) of s 2 of Ordinance 2/69. This is illustrated in *Murphy v Duke* [1985] 2 All ER where it was held at p 280:

> It seems to me that, if, in fact, the process of selling goods in the way that C this organization sells them were to be a transaction property called a 'collection' under the 1939 Act, then it would have been wholly unnecessary for Parliament to have passed the 1958 Act. It would be quite unnecessary to say that you should be committing an offence if you represent that the goods have been made by blind people in selling those goods if the mere selling brought you into conflict with the 1939 Act. Parliamentary time is D sufficiently precious for Parliament not to pass unnecessary Acts of Parliament. It seems to me that this Act would have been quite unnecessary had the activity of selling goods of these descriptions in those circumstances already been a breach of the requirements of the 1939 Act. It seems to me that you can read the two Acts very easily together because the 1958 Act singles out, as the activity, in the course of which representations must not E be made, the activity of selling or soliciting orders for goods of any description, whereas the 1939 Act singles out for treatment the activity of giving whether for a consideration or not money or other property. Those seem to me to be two stark oppositions and the 1939 Act cannot be said, having regard to the 1958 Act, to be dealing with sales.

If s 2 of Ordinance 2/69 is held to exclude the delegation of the Yang F di-Pertuan Agong's legislative powers, then it is consistent and not in conflict with s 11 of the DOPA. It would then follow that the Regulations are invalid as the Director of Operations made them pursuant to his purported powers when no such powers have been delegated to him under that section. G

His alternative submission was that if that relevant provision is held to delegate the Yang di-Pertuan Agong's legislative powers to the Director of Operations and therefore in conflict with s 11 of the DOPA, then the latter would prevail over the former because of s 23 of Act 388 which provides: H

> (1) Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency.
>
> (2) In this section 'Act' includes a federal law styling itself an Ordinance or Enactment. I

He further argued that the DOPA is a Federal law but Ordinance 2/69 is not as it was made not by Parliament but by the Yang di-Pertuan Agong pursuant to cl (2) of art 150 of the Constitution upon the proclamation of

an emergency. At best, he added, Ordinance No 2/69 is only subsidiary legislation being a law made pursuant to a lawful authority and having legislative effect.

Learned counsel contended that he is reinforced in his aforesaid submission by the fact that by the Constitution (Amendment) Act 1981 (Act A514), cl (2C) of art 150 was added and which provides that an ordinance promulgated under the new cl (2B) shall have 'the same force and effect as an Act of Parliament and shall continue in full force and effect as if it is an Act of Parliament'. However, this deeming provision only came into force on 15 May 1981. It is clear, he added, that Parliament itself recognized the fact that any ordinance so promulgated has no status or effect as an Act of Parliament and saw it fit to enact a deeming provision to deem it to have the force and effect of an Act of Parliament. It is also pertinent, he said, to note that cl (2C) of art 150 of the Constitution has no retrospective effect and could not, in any event, have been meant to resurrect the status and effect of an ordinance, namely Ordinance 2/69, long repealed in 1971 and which was promulgated under the old cl (2) of art 150. As such, it was his submission that Ordinance 2/69 was subsidiary legislation and the DOPA an Act for the purpose of s 23 of Act 388 and sub-s (1) of s 23 thereof would apply and would render that part of sub-s (1) of s 2 of Ordinance 2/69 void for being inconsistent with s 11 of the DOPA in so far as sub-s (1) of s 2 of Ordinance 2/69 purported to delegate legislative powers of the Yang di-Pertuan Agong to the Director of Operations and therefore, it follows that the Director of Operations again had no power to make the Regulations which are consequently invalid.

He referred to cl (8)(b)(iii) of art 150 of the Constitution which provides as follows:

> (8) Notwithstanding anything in this Constitution —
>
> (a) ...; and
>
> (b) no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground regarding the validity of —
>
> (i) ...;
>
> (ii) ...;
>
> (iii) any ordinance promulgated under clause (2B); or
>
> (iv) ...;

It would appear, he said, again at first blush, that the said provision ousts the jurisdiction of this court from enquiring into the validity of Ordinance 2/69. It is, however, clear upon closer analysis, that the said provision has no application in the instant case as Ordinance 2/69 was promulgated under the old cl (2) of art 150, and not cl (2B) of art 150 which only came into effect on 15 May 1981 as amended by Act A514. Clause (6) of art 150 of the Constitution also has no application as it speaks of an inconsistency with the Constitution not an inconsistency with an Act of Parliament or a federal law, namely the DOPA.

Learned counsel for the appellant further submitted that if the court held that there was a conflict between the two provisions and that Ordinance 2/69 is not subsidiary legislation, the maxim generalia specialibus non derogant applies, contrary to what the learned senior federal counsel submitted, in favour of the appellant.

He said that this was because it is an Act specifically enacted to deal with, as stated by its long title, the expressed subject of 'the delegation of certain statutory powers and duties and the signing of certain documents'. As stated in *Barker v Edger* [1898] AC 748, when a legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms. On the other hand, he said, Ordinance 2/69 while promulgated by the Yang di-Pertuan Agong after the Proclamation of Emergency in 1969, dealt generally with the functions, powers and authorities of the Director of Operations. The fact that Ordinance 2/69 is a later law is not conclusive. Firstly, the rationale behind the principle that a later law will prevail over an earlier one is based on the concept that Parliament is supreme and an earlier Parliament cannot bind a later Parliament, and therefore a later Parliament can make a law inconsistent with a law made by an earlier Parliament and such a later law may prevail over the earlier law. The cases cited in support include the case of *R v Camberwell City Council, ex p Heller & Gocs* [1965] VR 491. It is, however, obvious, he added, that in our instant case, we are not concerned about a later law namely Ordinance 2/69 made by Parliament as it was made by the Yang di-Pertuan Agong and the aforesaid principle based on Parliamentary supremacy can have no such application.

Secondly, a special law earlier in time may still prevail over a later general law. In *Sanwarmal Kejriwal v Vishwa Co-Operative Housing Society Ltd* AIR 1990 SC 1563, the Supreme Court of India said at p 1575:

> It was, however, submitted by the learned counsel for the society that the earlier enactment, ie the Rent Act must yield to the later Act, ie the Societies Act, if the competing provisions of the two cannot be reconciled — *lex posterior derogat priori*. But the Rent Act is a special law extending protection to tenants, just as the Industrial Disputes Act which makes provision for the benefit of the workmen. Ordinarily, therefore, a general provision, a dispute touching the business of the society, would have to give way to the special provision in the Rent Act on the maxim generalia specialibus non derogant. That is why this court harmonized the said provisions by holding that in matters covered by the Rent Act, its provisions, rather than the provisions of the Societies Act, should apply.

Even if the Regulations may be termed as subsidiary legislation which have not been repealed, learned counsel had continued, the fact that remains is that the Director of Operations derived his powers to make the Regulations from s 96 of the Act read together with sub-s (1) of s 2 of Ordinance 2/69. He added that if either of the combined sources of power is repealed, namely in this case Ordinance 2/69, then such subsidiary legislation made

under the combined sources, even though it may properly be termed as subsidiary legislation of the unrepealed Act or source of power, will be repealed or will cease to have any force unless there are saving provisions which in our case there is none and therefore the Regulations have ceased to have effect.

The respondent has also referred to the cases of *Najar Singh v Government of Malaysia & Anor* [1976] 1 MLJ 203 and *Government of Malaysia v Mahan Singh* [1975] 2 MLJ 155 to support the submission that the Regulations are valid. It is the appellant's contention that the question of the validity of the delegation of the legislative powers of the Yang di-Pertuan Agong to the Director of Operations in relation to s 11 of the DOPA was not in issue in either case. Actually it was, in the latter. In *Najar Singh*, the Privy Council did not deal with the question of the delegation of legislative powers but we cannot assume that there was a proper delegation of the Yang di-Pertuan Agong's legislative powers and that the Regulations were valid. In *Mahan Singh*, there was a challenge to the validity of the delegation of the Yang di-Pertuan Agong's powers in Ordinance 2/69. Suffian LP stated at p 161 as follows:

> It is argued that the Yang di-Pertuan Agong may delegate only part of his power (see *Eng Keock Cheng*) (supra); that by sub-s (1) of s 2 of the Emergency (Essential Powers) Ordinance (No 2) of 1969 published as PU (A) 149 on 17 May 1969. His Majesty purported to delegate all his power to the Director of Operations; that this purported delegation amounts to an abdication of His Majesty's power and is invalid, and accordingly reg 44 made by the Director of Operations in purported exercise of power delegated to him, is void. With all due respect, I do not think there is any merit in this argument. If His Majesty may delegate part of his power he may delegate all of it, and there is no question of abdication in the instant case: after promulgating Ordinance (No 2) of 1969 His Majesty remained Yang di-Pertuan Agung, still retained such power as he might have wished to exercise, and indeed has since then by PU (A) 62/71, s 3, in exercise of his royal power repealed that Ordinance.

Lee Hun Hoe CJ (Borneo) in his judgment at pp 163–165 said:

> There is one matter I would particularly like to touch on, that is, the contention of respondent that the Yang di-Pertuan Agong cannot delegate his powers under the Constitution. Normally, the power to legislate rests with the Yang di-Pertuan Agong [His Majesty] and the two Houses of Parliament, namely, the Dewan Negara [The Senate] and the Dewan Ra'ayat [The House of Representatives]. See art 44 of the Constitution. But where as a result of a national crisis an emergency is declared and Parliament is not sitting then the entire power falls on His Majesty ... . Ordinance No 2 of 1969 provides for the delegation of executive authority of Malaysia and all the powers and authorities concerned on His Majesty by any written law to the Director. This enabled the Director to make regulations to ensure the effective control of security, defence, maintenance of public order and supplies and services essential to the life of the community. Consequently, until Parliament could be summoned the Director could exercise all executive and legislative powers in Malaysia and in exercising such powers he was not subject to control by Parliament ... . In an emergency, the situation not being normal, extraordinary measures may have to be adopted. In such a

> situation, the nation comes first and there is nothing to prevent His Majesty from delegating all his powers both executive and legislative to some other authority. He chose to give such powers to the Director of Operations, who incidentally, happened to be our Deputy Prime Minister. It was a manifest necessity of the time. It would be futile to argue that the delegation of powers by His Majesty or, for that matter, Parliament, would be against the Constitution. The short answer to such an argument is provided by art 150(6). The wide power given to the Director of Operations lasted as long as the emergency existed. It was temporary in nature. It ceased to exist once Parliament annulled the Proclamation. In my opinion, it is not beyond the power of His Majesty or Parliament to enact Ordinances No 1 of 1969 and No 2 of 1969 and other such ordinances.

In conclusion, learned counsel for the appellant submitted that the Yang di-Pertuan Agong could not have delegated the legislative powers conferred on him by s 96 of the Act and the Regulations made by the Director of Operations pursuant to such purported delegated powers are invalid and consequently the disciplinary action taken against the appellant pursuant to the Regulations and the resulting demotion of the appellant are null and void.

We had considered those further submissions and are of the view that the words 'all powers and authorities' in sub-s (1) of s 2 of Ordinance 2/69 must include legislative powers as well especially because that subsection starts off with 'the executive authority'. If legislative powers were to be excluded, the words 'all' would not have been used at all and the word 'executive' would have been more apt and appropriate.

As for s 8 of Ordinance 2/69, it only refers to legislative powers to be exercised by the Director of Operations under the earlier Ordinance 1/69. This obviously is for two reasons. Firstly, there is no necessity to give him the legislative powers under Ordinance 2/69 as that is already delegated to him under s 2 thereof, which only reinforces our earlier finding, and secondly, this is because he had not been given the said powers under the earlier emergency Ordinance.

Whether this delegation of powers is in direct conflict with s 11 of the DOPA must be answered in the negative because the DOPA does not apply to the Constitution under which Ordinance 2/69 is made. Our conclusion coincides with the earlier findings of the Privy Council in *Najar Singh v Government of Malaysia* and the Federal Court's decision in *Government of Malaysia v Mahan Singh* which both state that the Regulations are valid although the validity of the delegation of the legislative powers by the Yang di-Pertuan Agong was not the main issue in either case.

Having said that and although at first we were inclined to agree with learned counsel for the appellant that the Regulations were no longer in force in view of the repeal by Ordinance 77/71 of Ordinance 2/69 with no saving clause, a closer look at the opening paragraph of the Regulations indicate that they were actually made under the Act which is still in force as it has never been repealed. Accordingly, the subsidiary legislation thereunder, namely the Regulations are still in force and the orders made thereunder by the police disciplinary authority had been validly made

A although the maker empowered by delegation, namely the Director of Operations, now no longer exists.

However, in view of the doctrine of condonation, we are of the considered opinion that the charges against the appellant cannot stand and accordingly, we allow this appeal with costs here and below, set aside the B order of the court below, order that the appellant be reinstated to the rank of sub-inspector from the date of the reduction of his rank to sergeant- major by the police disciplinary authority up to the date of his previously approved optional retirement on 1 December 1991, and order that the deposit be refunded to the appellant.

C *Appeal allowed.*

Reported by Azra Azman-Parry

D

E

F

G

H

I